

ATTORNEY GENERAL
STEPHEN E. MERRILL

DEPUTY ATTORNEY GENERAL
JEFFREY R. HOWARD

ASSOCIATE ATTORNEY GENERAL
BRIAN T. TUCKER

THE STATE OF NEW HAMPSHIRE



THE ATTORNEY GENERAL
ENVIRONMENTAL PROTECTION BUREAU
STATE HOUSE ANNEX
25 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

(603) 271-3679

SENIOR ASSISTANT ATTORNEYS GENERAL
ROBERT P. CHENEY, Jr.
GEORGE DANA RISBEE

ASSISTANT ATTORNEYS GENERAL
LESLIE J. LUTKE
JEREMY F. KOZENIK

ATTORNEYS
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GEOFFREY M. HUNTINGTON

INVESTIGATOR
KEVIN J. MCCARTHY

PARALEGAL

~~ANNE K. THURMAN~~
Marcia A. B. Thunberg

August 15, 1988

Mr. Alden H. Howard, Commissioner
Department of Environmental Services
6 Hazen Drive
Concord, New Hampshire 03301

Mr. Delbert F. Downing, Chairman
Wetlands Board
64 North Main Street
Concord, New Hampshire 03301

Gentlemen:

By letter dated July 12, 1988, you requested this office to advise you as to the extent of the Wetlands Board's authority to impose certain conditions on its approval of a water intake structure. We understand that on July 2, 1988, the Board approved a permit application submitted by the Town of Lincoln for a water intake structure to be constructed in the East Branch of the Pemigewasset River. In approving the intake structure, the Board imposed the following three conditions: (1) that modified plans be submitted to the Wetlands Board if the two hundred foot extension of the intake pipe shown on the approved plans is utilized; (2) that proper siltation controls be utilized during construction, that a temporary dike be constructed, and that the dike be removed during periods of low flow; and (3) that withdrawal of water from the Pemigewasset River be limited to 3.1 cfs.



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In your opinion request you ask this office to determine not only the extent of the Wetlands Board's authority to condition its approval of the intake structure, but also to rule on the validity of the actual conditions imposed by the Board on the Town of Lincoln's proposed intake structure. This opinion will address the general extent of the Board's authority to condition its approval of applications, and then will consider the validity of the conditions imposed on the Town of Lincoln's application in light of the Board's supporting factual findings.

The general authority of the Wetlands Board to impose conditions upon the approval of a project application is beyond dispute. RSA 483-A:4-a specifically provides that, "decisions of the board may contain reasonable conditions designed to protect the public good." Although this statute appears to confer virtually unlimited authority on the Board to condition its approval of a project, the actual extent of its authority is limited by the jurisdiction conferred upon it by the legislature. RSA 483-A:1-b defines the purpose of the Wetlands Board as that of the protection and preservation of wetlands from "despoliation and unregulated alteration...." In carrying out its mandate to protect and preserve wetlands from despoliation or alteration, the Wetlands Board, under the statute, may consider the manner in which the proposed project will (1) damage or destroy valuable plant or animal habitats; (2) eliminate, depreciate or obstruct commerce, recreation and aesthetic enjoyment of the public; (3) damage groundwater levels; (4) adversely affect stream channels; (5) disturb the ability of wetlands to absorb flood waters; or (6) adversely affect the interests of the general public. While the public purpose clause, and the values delineated therein, provides general guidance as to the extent of the Board's authority, the statute requires that the Board adopt regulations specifying the specific criteria supporting its decisions. RSA 483-A:4-a, V provides that, "[t]he board shall adopt regulations establishing criteria for approval and disapproval of applications under this chapter and with respect to all other substantive duties imposed by this chapter."

The regulations of the Wetlands Board set forth specific criteria applicable to the construction of a water intake structure. Wt 606.11(a) provides that "velocity of inflow or outflow shall not cause scouring or erosion of wetlands, turbidity or disturbance of vegetation, finfish, crustacea, shellfish, or wildlife." Wt 606.11(b) states that "intake and outflow structures and the flows resulting shall not endanger the navigation, recreation or commerce of the public." The conditions imposed by the Board on the construction of an intake structure should directly relate to or promote the interests identified in Wt 606.11(a) and (b). To the extent that the conditions go beyond the specific interests identified in Wt 606.11, the Board should identify both the interest served by the condition and the source of the Board's authority to promote that interest.

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The specific conditions imposed by the Board must directly relate to the criteria identified in both the finding of public purpose and Wt 606.11. In order to determine whether the conditions imposed by the Board relate to the criteria delineated in the public purpose clause and Wt 606.11, the Board must make specific factual and legal findings which support the imposition of the conditions. For example, the Board might find that the proposed siltation control will ensure that erosion, run-off or sedimentation will not damage fish and wildlife habitat, impair the aesthetic or recreational value of the wetlands, or reduce water quality. Unless a finding such as this is made in support of a condition, the relation of the condition to the criteria, which the Board may properly consider in reaching its decision, cannot be determined.

Similarly, the Board may condition the construction and operation of a water intake structure by limiting the amount of water which may be withdrawn. However, if such a condition is placed upon the construction or operation of an intake structure, the Board must support the condition with adequate factual findings. The imposition of this type of condition should not, however, be construed as providing authority for the Board to allocate water among users or to determine the extent of riparian use of the water.

Because the validity of a condition depends upon the factual relationship of that condition to the statutory and regulatory criteria, the validity of the conditions imposed upon the Town of Lincoln's application cannot be ascertained at this time. In issuing its approval subject to these conditions, the Board found only that (a) the withdrawal will be less than 10% of the flow in all except the most extreme cases, and (b) that conditions imposed are in keeping with the requirements of RSA 483-A:4-a,III and RSA 483-A:1-b. Neither of these findings elucidates facts sufficient to determine the connection of these conditions to the expressed statutory or regulatory criteria.

Moreover, it should be emphasized that both RSA 483-A:4-a and ch. 541-A require written factual findings to support decisions. Under both of these statutes, a decision must include:

[f]indings of fact and conclusions of law separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

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Under these statutes, it is evident that the mere recitation that the Board finds that the conditions are in keeping with the statute is insufficient. Accordingly, we conclude that the Board should reconsider the conditions imposed upon its approval of the Town of Lincoln's application in light of the applicable statutory and regulatory criteria cited in this opinion, and should, if approval is granted subject to the stated conditions, make adequate factual and legal findings supporting the conditions.

I trust that this letter is responsive to your inquiry. Please do not hesitate to call should you require additional assistance.

Sincerely,



Leslie J. Ludtke
Assistant Attorney General
Environmental Protection Bureau

LJL/sed

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